INDEX

	Page
Jurisdiction	1
Questions Presented	2
Summary of Argument	2
Statement of the Case	6
Argument	9
I. No Federal Question Is Before This Court	9
II. Petitioner Has Not Been Deprived of Constitutional Rights	15
A. Act 201 Is Constitutional	15
B. The Procedure Followed by the Michigan Supreme Court Was Consistent With Due Process of Law	23
Conclusion	35
Appendix A	1a
Appendix B	14a

CITATIONS

CASES:

American Surety Co. v. *Baldwin*, 287 U.S. 156, 53 S. Ct. 98, 77 L. ed. 231 (1932) 3, 10, 12, 13, 14, 31

Bailey v. *Anderson*, 326 U.S. 203, 66 S. Ct. 66, 90 L. ed. 3 (1945) 3, 10, 14

Beck v. *Washington*, 369 U.S. 541, 82 S. Ct. 955, 8 L. ed. 2nd 98 (1962) 3, 10

Brinkerhoff-Farris Trust & Savings Co. v. *Hill*, 281 U.S. 673, 50 S. Ct. 451, 74 L. ed. 1107 (1930) ... 6, 33-35

Butler Bros. v. *McColgan*, 315 U.S. 501, 62 S. Ct. 701, 86 L. ed. 991 (1942) 6, 33

Page

Carr v. *Nichols*, 157 U.S. 370, 15 S. Ct. 640, 39 L. ed. 736 (1895) 31
Cashaw v. *Great Lakes Greyhound Lines, Inc.*, 331 Mich. 291, 49 N.W. 2d 183 (1951) 26
Edelman v. *California*, 344 U.S. 357, 73 S. Ct. 293, 97 L. ed. 387 (1953) 3, 10
Erie R. Co. v. *Duplak*, 286 U.S. 440, 52 S. Ct. 610, 76 L. ed. 1214 (1932) 22
Erie R. Co. v. *Hilt*, 247 U.S. 97, 38 S. Ct. 435, 62 L. ed. 1003 (1918) 23
Ferguson v. *Georgia*, 365 U.S. 570, 81 S. Ct. 756, 5 L. ed. 2nd 783 (1961) 3, 10
Great Northern Ry. Co. v. *Sunburst Oil Refining Co.*, 287 U.S. 358, 53 S. Ct. 145, 77 L. ed. 360 (1932) 3, 10
In re Del Monte's Estate, 340 Mich. 165, 65 N.W. 2d 309 (1954) 5, 25
Lyshak v. *City of Detroit*, 351 Mich. 230, 88 N.W. 2d 596 (1958) 16, 18, 22
Michaelson v. *Simula*, 264 Mich. 457, 250 N.W. 264 (1933) 5, 25
Morey v. *Doud*, 354 U.S. 457, 77 S. Ct. 1344, 1 L. ed. 2nd 1485 (1957) 22
Morris v. *Lewis Mfg. Co.*, 331 Mich. 252, 49 N.W. 2d 164 (1951) 16
Mutual Life Ins. Co. v. *McGrew*, 188 U.S. 291, 23 S. Ct. 375, 47 L. ed. 480 (1903) 2, 10, 14
Naudzius v. *Lahr*, 253 Mich. 216, 234 N.W. 581 (1931) 5, 25
Oyama v. *California*, 332 U.S. 633, 68 S. Ct. 269, 92 L. ed. 249 (1948) 20, 21
Queenside Hills Realty Co. v. *Saxl*, 328 U.S. 80, 66 S. Ct. 850, 90 L. ed. 1096 (1946) 19
Saunders v. *Shaw*, 244 U.S. 317, 37 S. Ct. 638, 61 L. ed. 1163 (1917) 3, 6, 14, 15, 23, 31-35
Silver v. *Silver*, 280 U.S. 117, 50 S. Ct. 57, 74 L. ed. 221 (1929) 19, 23
Stembridge v. *Georgia*, 343 U.S. 541, 72 S. Ct. 834, 96 L. ed. 1130 (1952) 3, 10
Williamson v. *Lee Optical of Okla.*, 348 U.S. 483, 75 S. Ct. 461, 99 L. ed. 563 (1955) 17, 19
Wilson v. *Cook*, 327 U.S. 474, 66 S. Ct. 663, 90 L. ed. 793 (1946) 3, 10

MISCELLANEOUS: Page

Hill, "The Inadequate State Ground," 65 Colum. L. Rev. 943 (1965) 24

Note, 1964 Wisc. L. Rev. 705 19

Stern and Gressman, *Supreme Court Practice* Section 3-27 (3rd Edition 1962) 3, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 48

HERBERT HEIDER, Administrator for the Estate of JAMES D. HEIDER, Deceased, *Petitioner,*

v.

MICHIGAN SUGAR CO., a Michigan Corporation, *Respondent,*

and

HERBERT HEIDER, Administrator for the Estate of DAVID HEIDER, Deceased, *Petitioner,*

v.

MICHIGAN SUGAR CO., a Michigan Corporation, *Respondent.*

BRIEF OF RESPONDENT

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257. Jurisdiction under this statute depends on federal questions being seasonably raised in the state courts. As is set forth in our brief under Point I, none of the questions raised here was timely raised below. Thus, no federal question is properly before this Court and the *writ* of *certiorari* should be dismissed.

QUESTIONS PRESENTED

I

Are the federal questions raised by Petitioner properly before this Court when such questions were raised for the first time in a petition for rehearing to the Michigan Supreme Court which denied the petition without opinion?

II

Does a Michigan statute limiting the liability of landowners in the case of trespassers who are on the land for hunting, fishing and trapping violate the equal protection guarantees of the 14th Amendment?

III

Can due process be construed to prevent a State Supreme Court from dismissing a complaint for failure to state a cause of action under a state statute when the statute was raised for the first time on appeal; while the state Supreme Court considered the applicability of the statute, no claim was made that any new facts could be shown which would render the statute inapplicable; and the statute had been enacted many years prior to the suit so that no claim of surprise at the existence of the statute would be justified?

SUMMARY OF ARGUMENT

I

Neither of the federal questions posed by Petitioner is properly before this Court. The Court will not consider a case on certiorari when the petitioner had failed to raise the federal question at the appropriate stage of the state court proceedings. *Mutual Life Ins. Co.* v. *McGrew,* 188 U.S. 291, 23 S. Ct. 375, 47 L. ed.

480 (1903); *American Surety Co.* v. *Baldwin,* 287 U.S. 156, 53 S. Ct. 98, 77 L. ed. 231 (1932); *Great Northern Ry. Co.* v. *Sunburst Oil and Refining Co.,* 287 U.S. 358, 53 S. Ct. 145, 77 L. ed. 360 (1932); *Bailey* v. *Anderson,* 326 U.S. 203, 66 S. Ct. 66, 90 L. ed. 3 (1945); *Wilson* v. *Cook,* 327 U.S. 474, 66 S. Ct. 663, 90 L. ed. 793 (1946); *Stembridge* v. *Georgia,* 343 U.S. 541, 72 S. Ct. 834, 96 L. ed. 1130 (1952); *Edelman* v. *California,* 344 U.S. 357, 73 S. Ct. 293, 97 L. ed. 387 (1953); *Ferguson* v. *Georgia,* 365 U.S. 570, 81 S. Ct. 756, 5 L. ed. 2nd 783 (1961); *Beck* v. *Washington,* 369 U.S. 541, 82 S. Ct. 955, 8 L. ed. 2nd 98 (1962); Stern and Gressman, *Supreme Court Practice,* section 3-27 (3rd Edition 1962). And where, as here, the questions are not raised until the petition for rehearing before the State Supreme Court, this Court has refused to consider the case on the merits. *American Surety Co.* v. *Baldwin,* 287 U.S. 156, 53 S. Ct. 98, 77 L. Ed. 231 (1932). Since Petitioner had adequate opportunity to raise all federal issues before the Michigan Supreme Court, the limited exception to this jurisdictional requirement stated in *Saunders* v. *Shaw,* 244 U.S. 317, 37 S. Ct. 638, 61 L. ed. 1163 (1917) would not apply.

II

A

The challenge made by Petitioner to the constitutionality of Act 201 is groundless. That statute provides that no cause of action shall arise from injuries to any person who is on the land of another for the purpose of fishing, hunting, or trapping, unless such person has paid the owner compensation for such activity, or unless the injuries are caused by the gross negligence or the wilful and wanton misconduct of the landowner. It is difficult to take seriously the conten-

tion that the classification of fishermen, hunters and trappers is an invidious classification. There are at least two sound reasons of policy which could explain the statute and the classification. First, the legislature may have been trying to deter trespassers. It may have felt that stronger deterrents were required against those who hunt, fish or trap than against other kinds of trespassers. These sportsmen are armed with implements of destruction which may be hazardous to the owner or his livestock or fowl. These are the trespassers who too frequently are oblivious of the rights of the property owners in their quest for game. A second possible purpose of the statute is to encourage landowners to make their land and water areas available to the public for designated recreational purposes by limiting the landowners' liability to such recreational users. A legislative decision that those in greatest needs of access to large areas of privately owned land are hunters, trappers, and fishermen could hardly be challenged as arbitrary. The weakness of the Petitioner's position is further highlighted by the existence in many states of similar legislation, which, in many cases, explicitly asserts a purpose to encourage landowners to make available their land to various sportsmen.

B

Petitioner's principal argument that he was denied a day in court by the action of the Michigan Supreme Court in deciding the case on the basis of Act 201 even though this Act had not been considered before the trial court is equally devoid of merit. The statute was enacted in 1953 and should have been known as well to Petitioner as to Respondent. Nothing in Respondent's conduct and no action of any state court precluded Petitioner from knowing about the existence of the

statute. It was Petitioner's responsibility to plead and prove his case according to Michigan law. *In re DelMonte's Estate,* 340 Mich. 165, 65 N.W. 2d 309 (1954); *Michaelson* v. *Simula,* 264 Mich. 457, 250 N.W. 264 (1933); *Naudzius* v. *Lahr,* 253 Mich. 216, 234 N.W. 581 (1931). Yet after pleading that James and David Heider "set out muskrat hunting", Petitioner did not allege either gross negligence or payment of compensation. Had the trial court interpreted the statute to require the pleadings which the Michigan Supreme Court later required, Petitioner would have had no constitutional claim. But Petitioner contends that because the dismissal for failure to state a cause of action was by the state Supreme Court, he was deprived of a hearing on the factual questions of whether the statute was applicable or its conditions were satisfied. However, this claim has no support in the record. The applicability of the Act 201 was directly in issue before the Michigan Supreme Court. Yet Petitioner did not claim, at any time, that any state of facts yet unproved would render the Act inapplicable. He at no time indicated that any new evidence could be presented or that any factual hearing should be required if the Michigan Supreme Court found the Act applicable. At no time did Petitioner move for leave to amend the complaint. Under these circumstanes, the Michigan Supreme Court could constitutionally rely on the pleadings and on the record before it in determining whether the statute was to be applied. And the record contains statement after statement from which the court could justifiably conclude that the statute was applicable and that its conditions were not complied with. Thus, after full hearing on the question whether Act 201 could or should be applied to bar the Petitioner's claim in this case, the Michigan Supreme Court found for Respondent. There was no denial of a hearing.

This case is unlike *Saunders* v. *Shaw,* 244 U.S. 317, 37 S. Ct. 638, 61 L. ed. 1163 (1917), where the state Supreme Court, on rehearing, reversed its decision on the basis of a United States Supreme Court decision which came down after the issuance of the original opinion by the Supreme Court of the state and in the decision on rehearing made a finding on a disputed issue of fact on which the defendant had no opportunity to be heard. Here, there was no contested issue of fact before the Michigan Supreme Court. Petitioner himself had admitted or established all the relevant facts. While, in *Saunders,* the defendant had taken all necessary procedural steps on his behalf, in the instant case, Petitioner failed to set out a cause of action under Michigan law. Furthermore, the decision of the Michigan Supreme Court was not based on a supervening change in the law but on a reasonable interpretation of a statute which predated the litigation. See *Brinkerhoff-Farris Trust & Savings Co.* v. *Hill,* 281 U.S. 673, 50 S. Ct. 451, 74 L. ed. 1107 (1930); *Butler Bros.* v. *McColgan,* 315 U.S. 501, 62 S. Ct. 701, 86 L. ed. 991 (1942). The question of the application of the statute was at issue before the Michigan Supreme Court and was fully argued there. At that time Petitioner did not indicate that the record was in any way deficient or that a new hearing should be required. Petitioner had his full day in court.

STATEMENT OF THE CASE

This case involves two suits in the Circuit Court of Saginaw County, Michigan, by the administrator of the estates of two minor children, James and David Heider, to recover damages from Michigan Sugar Company for the deaths of the two children which occurred on December 21, 1958. The gist of the plain-

tiffs' pleadings was that the boys were muskrat trapping; they had some traps with them and they went onto a frozen pond on Respondent's land; the ponds were frozen except in the region immediately adjacent to a spot in the pond where Respondent discharged waste products; these waste products have a chemical in them which creates a foamy appearance like ice; Respondent knew that children utilized this land for the purpose of trapping, and, in the exercise of "ordinary care",[1] it should have known that persons walking on the frozen pond would have been misled by the foamy substance and would believe the entire pond was frozen, and could drown (R. 2-5, 13-14, 31-33, 56-58).

Judgment in the Circuit Court was entered for the Petitioner in both cases, and Respondent appealed to the Michigan Supreme Court. There Respondent, in its opening brief, for the first time called to the Court's attention Act No. 201 of the Michigan Public Acts of 1953 providing that no cause of action shall arise from injury to any person who is on the lands of another for the purpose of fishing, hunting or trapping unless a showing is made either that the person was on the land as a result of a payment of a valuable consideration for the activity or unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the landowner. Although this statute was enacted in 1953, Respondent's counsel was unaware of its existence until he started to brief the case for the Michigan Supreme Court. Apparently, the trial court and Petitioner's counsel were also unaware of the statute; in any event, Petitioner made no reference to it in the

[1] See ¶¶ 16 and 17 of complaints (R. 3, 32); see also Petition for Certiorari, p. 9, where Petitioner concedes that he tried the cases "under the theory of ordinary negligence of a landowner."

complaints or in any of the proceedings in the Circuit Court. In the Michigan Supreme Court, Respondent requested the Court to consider Act 201, cited authorities as to the power of the Court to consider the Act even though raised for the first time at the appellate level, and requested the Court to reverse the judgment of the Trial Court with or without a new trial (Appendix A, pp. 1a-11a).[2]

Petitioner in his Brief before the Michigan Supreme Court objected to the consideration of Act 201 by that Court because the Act was not properly and timely raised. He cited a number of state authorities which he maintained held that the Michigan Supreme Court should not consider the statute. Petitioner went further and argued that the cited statute in any event should not be construed as applying to minors (Appendix A, pp. 11a-12a).

The Michigan Supreme Court by a 5 to 3 vote reversed the judgment of the Trial Court and ordered the complaint dismissed. Two of the five judges were of the opinion that even without considering Act 201, a reversal was required since Petitioner's evidence as a matter of law failed to show that Respondent was guilty of ordinary negligence (R. 325). Five Judges were of the opinion that the Court had the right to consider Act 201 and that Petitioner had failed to show that he had a cause of action within the meaning of that Act (R. 325-330). Three judges dissented, holding that it was not appropriate for the Michigan Supreme Court to consider Act 201 when it was first

---

[2] We are reprinting in Appendix A to this Brief the portions of both Respondent's and Petitioner's Briefs before the Michigan Supreme Court containing the arguments with respect to Act 201.

injected into the case at the appellate level (R. 335-337).

Petitioner then filed an Application for Rehearing with the Michigan Supreme Court (R. 339-346). Here for the first time[3] Petitioner raised the issues that Act 201 violated the Fourteenth Amendment of the United States Constitution and that the action of the Michigan Supreme Court in considering Act 201 when first raised on appeal deprived Petitioner of due process of the law. The Application for Rehearing was denied by the Michigan Supreme Court without opinion by a 5 to 2 vote (R. 347).

ARGUMENT

I.

NO FEDERAL QUESTION IS BEFORE THIS COURT

This case is here on certiorari under 28 U.S.C. § 1257 on the claim that Petitioner has been deprived of rights guaranteed to him by the Fourteenth Amendment of the Constitution. Petitioner bases his constitutional argument on two points. First, he argues that he was deprived of his constitutional rights by virtue of the fact that the Michigan Supreme Court reversed the judgment in his favor on the basis of Act 201 when that Act was not considered in the Trial Court proceedings and was raised for the first time on appeal to the Michigan Supreme Court. Secondly, Petitioner argues that Act 201 is unconstitutional in that it denies the equal protection of the law required by the Fourteenth Amendment.

Respondent contends that these questions are not presented by the record. The Court will not consider a

[3] See Petition for Certiorari, p. 8; Brief for Petitioner, p. 9.

case on certiorari when the petitioner has failed to raise the federal question at the appropriate stage of the state court proceedings. *Mutual Life Ins. Co.* v. *McGrew,* 188 U.S. 291, 23 S. Ct. 375, 47 L. ed. 480 (1903); *American Security Co.* v. *Baldwin,* 287 U.S. 156, 53 S. Ct., 98, 77 L. ed. 231 (1932); *Great Northern Ry. Co.* v. *Sunburst Oil and Refining Co.,* 287 U.S. 358, 53 S. Ct. 145, 77 L. ed. 360 (1932); *Bailey* v. *Anderson,* 326 U.S. 203, 66 S. Ct. 66, 90 L. ed. 3 (1945); *Wilson* v. *Cook,* 327 U.S. 474, 66 S. Ct. 663, 90 L. ed. 793 (1946); *Stembridge* v. *Georgia,* 343 U.S. 541, 72 S. Ct. 834, 96 L. ed. 1130 (1952); *Edelman* v. *California,* 344 U.S. 357, 73 S. Ct. 293, 97 L. ed. 387 (1953); *Ferguson* v. *Georgia,* 365 U.S. 570, 81 S. Ct. 756, 5 L. ed. 2nd 783 (1961); *Beck* v. *Washington,* 369 U.S. 541, 82 S. Ct. 955, 8 L. ed. 2nd 98 (1962); Stern and Gressman, *Supreme Court Practice* Section 3-27 (3rd Edition 1962).

The record shows that in the Michigan Circuit Court Petitioner failed to assert any claim concerning the unconstitutionality of Act 201. This Act was first called to the attention of the Michigan Supreme Court in connection with the opening Brief of Respondent on its appeal from the judgment of the Circuit Court. (See Appendix A) Included in the Statement of Questions Involved was Question X, reading as follows:

> "Does Act 201, Public Acts of 1953, page 281 (1948 C. L. 300.201; M.S.A. 13,1485) require this Court to reverse the Trial Court with or without a new trial, even though it was not brought to the attention of the Trial Judge?"

Respondent in its Brief set forth the language of Act 201 and cited a number of authorities supporting its contention that under state law the Court should

consider the statute and proceed to reverse the judgment either with or without a new trial. Petitioner in his Brief in the Michigan Supreme Court objected to that Court considering Act 201 arguing that it was too late to inject Act 201 into the proceedings. Petitioner disagreed with the cases cited by the Respondent and set forth a number of Michigan State cases which he claimed required the Supreme Court to reject Respondent's request to consider Act 201. Petitioner also argued that as a matter of construction Act 201 should not be held applicable to minors.

Despite the fact that Respondent had made it quite clear in its Brief that it was urging the Michigan Supreme Court to consider Act 201 and on the basis of such statute to reverse the judgment in favor of Petitioner either with or without a hearing, Petitioner made no claim in his presentation before the Michigan Supreme Court that Act 201 was a violation of the Federal Constitution or that a violation of due process would occur if the Michigan Supreme Court were to reverse the judgment on the basis of the record made. Petitioner restricted his argument to state considerations as to why Act 201 should not be considered.

The Michigan Supreme Court adopted the reasoning of Respondent. It held that it had the right to consider Act 201 and reversed the judgment without ordering a new trial.

Petitioner then filed an Application for Rehearing with the Michigan Supreme Court. (R. 339-346) In that pleading Petitioner for the first time argued that Act 201 was unconstitutional and that the procedure followed by the Michigan Supreme Court was in contravention of the Fourteenth Amendment. The Michigan Supreme Court refused to consider the points

thus raised by Petitioner and denied the Application for Rehearing without an opinion. Two judges dissented from the order denying the Application for Rehearing, but they too did not write an opinion (R. 347).

American Surety Co. v. *Baldwin, supra,* is on all fours with the instant case. In that case, Baldwin had filed a suit in Idaho District Court for damages against Singer Sewing Machine Company and Anderson, its employee, for injuries to plaintiff resulting from an automobile accident. Judgment in the District Court was for Baldwin. Both defendants appealed, and American Surety Company filed a supersedeas bond. The Supreme Court of Idaho reversed the judgment against Singer Sewing Machine Company but affirmed the judgment as to Anderson. When Anderson failed to pay the judgment, Baldwin went into the Idaho District Court and had judgment entered against American Surety Company without notice. Three days after the entry of the judgment by the Idaho District Court, the Surety Company filed a motion in that Court to vacate and set aside the judgment against it. All of the grounds urged as the basis for relief were state law grounds. The District Court granted the motion of the Surety Company and set aside the judgment. Plaintiff thereupon appealed to the Idaho Supreme Court. Here, too, no federal questions were raised The Supreme Court of Idaho ordered the judgment for plaintiff reinstated holding that the Surety Company had misconceived its remedy. It should have filed a direct appeal to the Idaho Supreme Court from the judgment of the Idaho District Court entering a judgment against it without notice rather than filing a motion with the District Court to vacate and set aside that judgment. The Surety Company filed a Petition for Rehearing with the Idaho Supreme Court and for

the first time raised constitutional questions as to the validity of entering a judgment against it without notice. This Petition was denied by the Idaho Supreme Court without opinion.

On Petition for Certiorari, this Court dismissed the writ of certiorari saying (287 U.S. 156, 163-164, 53 S. Ct. 98, 100-101, 77 L. ed. 231, 236):

> "The federal claim there made [in the Petition for Rehearing] cannot serve as the basis for review by this Court. The contention that a federal right had been violated rests on the action of the trial court in entering judgment without giving notice and an opportunity to be heard. The same ground of objection had been raised throughout the proceedings, but solely as a matter of state law. There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment. . . . This is not a case where, as in Saunders v. Shaw, 244 U.S. 317, 320, the federal claim arose from the unanticipated disposition of the case at the close of the proceedings in the state Supreme Court."

In the instant case, Petitioner had adequate opportunity to raise all federal issues at that stage of the proceedings when Respondent in the Michigan Supreme Court raised the applicability of Act 201 to the matters in issue. Petitioner responded to the opportunity by challenging Act 201 and the right of the Michigan Supreme Court to apply it on state grounds, not on any federal grounds. As in *Baldwin*, Petitioner chose not to raise federal grounds until he filed an Application for Rehearing. The Supreme Court of Michigan refused to consider the arguments raised in the Application for Rehearing. The federal questions have never been passed upon by the Michigan Supreme Court,

Petitioner having failed to raise them at the appropriate time. These questions are therefore not properly before the Court. See *Mutual Life Ins. Co.* v. *McGrew, supra; American Surety Co.* v. *Baldwin, supra; Bailey* v. *Anderson, supra.*

A limited exception to the above rule is made where "the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding. . . ." *Saunders* v. *Shaw,* 244 U.S. 317, 320, 37 S. Ct. 638, 640, 61 L. ed. 1163, 1165 (1917). However, this exception can provide no comfort to Petitioner. The act of the Michigan Supreme Court here could not have been unexpected. Act 201 was in existence before Petitioner filed his complaints in the Circuit Court. He, as well as Respondent had overlooked it. In Respondent's opening Brief in the Michigan Supreme Court, Act 201 was called to the court's attention and the question of its application was argued in the briefs of both parties. No surprise to Petitioner was involved, no unanticipated result.[4] Petitioner might have hoped that he had persuaded the Supreme Court of Michigan as a matter of state law not to adopt the arguments urged by Respondent. However, a party cannot sit back and take a chance that the state Supreme Court will follow the line of authorities urged by him rather than those presented by the opponent. *American Surety Co.* v. *Baldwin, supra.* Nor should Petitioner have been surprised that the Michigan Supreme Court might reverse without remanding for a new trial. Respondent's Brief before the Michigan Supreme Court (App. A, p. 11a) urged that the trial court judgments be reversed

---

[4] Had the Michigan Supreme Court raised Act 201 *sua sponte* and not permitted the parties to file briefs on the subject, an argument based upon *Saunders* v. *Shaw* would be understandable.

"with or without a new trial even though the statute was not considered in the Court below." Yet Petitioner at no time asked the state Supreme Court for a new trial in the event of reversal. In light of Petitioner's failure to indicate to the Michigan Supreme Court that a new trial was necessary or useful, that any new evidence could be presented, or that any factual dispute was involved, there is no basis for a claim of surprise that the reversal was not accompanied with a new trial. Thus, there is no ground for arguing that Petitioner was confronted with a ruling that he could not reasonably anticipate or by a supervening act over which he had no control. The exception of *Saunders* v. *Shaw* is not applicable.

II.

PETITIONER HAS NOT BEEN DEPRIVED OF CONSTITUTIONAL RIGHTS

Petitioner levels a twofold attack on the judgment of the Michigan Supreme Court; both aspects of the attack are based upon the Fourteenth Amendment. First, he urges that Act 201 drawing a distinction between different types of trespassers violates the Equal Protection Clause. Second, he argues that the procedure of the Michigan Supreme Court in ordering Petitioner's complaints dismissed without a new trial denied him due process of law. Neither argument is well taken.

A.

Act 201 Is Constitutional

Act 201 was enacted in 1953. It provides that no cause of action shall arise for injuries to any person who is on the land of another for the purpose of fishing, hunting or trapping, unless such person has paid the owner compensation for such activity, or unless the injuries were caused by the gross negligence or the

wilful and wanton misconduct of the land owner. Petitioner urges (Br. 18-21) that the statute is unconstitutional because it denies equal protection of the law. It is Petitioner's position that the statute creates an invidious discrimination as between minors who, without paying compensation, come onto the land of another for swimming, skating, camping, or similar activities and other minors who, without paying compensation, come onto the land of another for hunting, fishing, or trapping.[5] As to the latter, if compensation is not paid, there is only a duty of avoiding gross negligence or wanton and wilful misconduct. As to the former, the common law of Michigan with its varying standards applies.[6] It is Petitioner's position that as a matter of equal protection it is unreasonable for a state legislature to draw this distinction.

Petitioner states that Act 201 creates an invidious discrimination but does not demonstrate why this is so. The cases are to the contrary. State legislatures have extremely broad power to draw distinctions between different types of activity and to attach vary-

---

[5] It should be pointed out that Act 201 is not limited to minors as Petitioner seems to imply. The Act is applicable to adults and minors alike. In the Court below, Petitioner (App. A, 12a-14a) urged the Michigan Supreme Court to construe Act 201 as not applicable to minors; that Court rejected the argument.

[6] The degree of care owed to a trespasser in Michigan under its common law depends on whether the trespasser is a minor or adult and also presumably on whether the trespasser is an invitee or licensee. Compare *Lyshak* v. *City of Detroit*, 351 Mich. 230, 88 N. W. 2d 596 (1958), with *Morris* v. *Lewis Mfg. Co.*, 331 Mich. 252, 49 N. W. 2d 164 (1951). Under Act 201 a single standard is provided for both minors and adults. That Act makes it clear that unless compensation is paid, no cause of action arises for injuries to those on the land of another for hunting, fishing or trapping, even though the trespasser is an invitee, licensee, or has the consent of the landowner unless there is a showing of gross negligence or wilful and wanton misconduct.

ing consequences to different types of conduct. This Court, in upholding an Oklahoma statute prohibiting opticians from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist stated:

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think.... Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.... The legislature may select one phase of one field and apply a remedy there, neglecting the others.... The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Williamson* v. *Lee Optical of Okla.*, 348 U.S. 483, 489, 75 S. Ct. 461, 465, 99 L. Ed. 563, 573 (1955).

It is difficult to see how Petitioner can seriously contend that Act 201 makes an invidious discrimination. While the legislative history of Act 201 is not available to cast light on the legislative purpose of the Act, it is easy to see why the Michigan legislature could have thought the statute was necessary. There are at least two sound reasons of policy which suggests themselves. First, the legislature could have thought that somewhat stronger deterrents were required against those who trespass on the land of others for the purpose of hunting, fishing or trapping than against other kinds of trespassers. The hunter, the trapper, the fisher is armed with implements of destruction which may be hazardous to the owner or his livestock or fowl. Ordinary campers and swimmers normally are not so armed. During hunting and trapping season, it is all too common to read in the newspapers accounts of trespassers, who, in their quest for game, are en-

tirely oblivious of the rights of property owners. It is easy to visualize broken fences, littered fields, and other evidence of trespassers' depredations during the hunting and trapping season. Thus, it is not surprising that the Michigan legislature sought to register its determination to protect legitimate owners and possessors of land, if not against their wilful trespassers, at least against the further insults of actions in court to recover damages because property has not been kept safe for such intruders.

Second, Act 201 could serve the purpose of encouraging landowners to make their land and water areas available to the public for designated recreational purposes. Under the Act, landowners are assured that if they give their permission to persons to use their land for recreational activities, they will not be subjected to damage actions for injuries to those who go on the land for those recreational purposes unless the landowners receive compensation or are guilty of wanton and wilful misconduct. Under the common law, landowners could be responsible for damages if the persons who came on the land were licensees or invitees. Express consent certainly created a status of invitee or licensee, but in many cases such status was found to exist without express consent from the mere toleration of the trespass. See *Lyshak* v. *City of Detroit, supra.* Without legislation such as Act 201 landowners could not be sure that they were entitled to protection against damage claims from trespassers. They, therefore, had every incentive to close off their land to persons desiring to use it for recreational purposes. Act 201 encourages landowners to open their land for recreational purposes by assuring them that they will not be lured into damages by any implied consent or invitee fiction. Indeed, they are advised that

they can even give their express consent for the use of the land and still not be responsible for damages unless they either receive compensation or they are guilty of wilful and wanton misconduct.[7] It is of no constitutional concern that the Michigan legislature proceeding to deal with the problem concluded that those in greatest need of access to large areas of privately owned land throughout Michigan were the hunters, trappers and fishermen. Although the legislature might have determined that other sportsmen had need for access to private land, the Michigan legislature was entitled to address itself to that aspect of the problem which seemed to it most urgent or the most obvious.[8]

---

[7] See Note, 1964 Wisc. L. Rev. 705. It is there pointed out that the forces behind a Wisconsin statute of somewhat the same type as Act 201 were the forest owners who wanted help in controlling large deer herds and also organizations representing sportsmen. The writer refers to the crisis in recreation involved in the growing shortage of land available for recreational uses. He concludes that "recreational demand has reached the point where sportsmen are willing to assume these risks as the price of gaining access to prime recreational resources such as forests and wetlands, held in private ownership." (p. 713).

[8] It is of interest to note that in 1964, the Michigan legislature amended Act 201 so as to extend the provisions which theretofore had been limited to those who came onto the land of another for the purpose of hunting, fishing, and trapping to include also those who came onto the land of another for the purpose of "camping, hiking, sightseeing, or other similar outdoor recreational uses." Apparently, experience has taught the Michigan legislature that the original objective which Act 201 was designed to achieve is not confined to fishing, hunting and trapping. The scope of the statute has now been made much wider. There is no constitutional infirmity involved in the legislature approaching a problem piecemeal, tackling only the immediate problem, leaving for later consideration and experimentation amendments to the Act in the event that experience should show that further action is required. *Silver* v. *Silver*, 280 U. S. 117, 50 S. Ct. 57, 74 L. ed. 221 (1929); *Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80, 66 S. Ct. 850, 90 L. ed. 1096 (1946); *Williamson* v. *Lee Optical of Okla.*, *supra*.

Michigan is not alone among the states in limiting the liability of landowners who permit the use of their land for various recreational purposes. A number of these states have clearly spelled out the purpose of the legislation to promote recreational opportunities on private land.[9] Others like Michigan have remained silent as to the purpose of the legislation but have protected landowners by limiting their liability.[10] Thus it is clear that the problem of dealing with trespassers who use the land of others for recreational purposes has come to the attention of many states and these states have attempted to deal with the problem in much the same manner as Michigan's Act 201. The existence of these statutes in other states is compelling proof that the problem towards which Act 201 is directed is a real one, and that the method of dealing with it is one that commends itself to reasonably minded legislatures of other states in addition to Michigan.

Petitioner (Br. 19-21) has cited two cases to support his argument. Neither is remotely in point. *Oyama* v. *California,* 332 U.S. 633, 68 S. Ct. 269, 92 L. ed. 249 (1948), involved a provision in the California alien land law forbidding ownership of agricultural lands by aliens ineligible to citizenship; land held in violation of the statute escheats to the state. The Act further provides that where land is conveyed to a person ostensibly

---

[9] Fla. Stats. Ann. § 375.251 (Supp. 1965); Smith-Hurd Ill. Stats. Ann., ch. 70, §§ 31 to 37 (Supp. 1965); Kan. Stats. Ann. §§ 58-3201 to 3207 (Supp. 1965); Baldwin's Ky. Rev. Stats. Ann., pt. 2, S.B. 311 (Supp. 1966); Minn. Stats. Ann. §§ 87.01 to .05 (1964); Neb. Rev. Stats. §§ 37-1001 to 1008 (Supp. 1965); and W. Va. Code Ann. §§ 2200(31) to (36) (Supp. 1965).

[10] We have set forth in Appendix B the citations to the various State statutes which deal with limitation of liability to trespassers for recreational purposes.

eligible to own land but where the consideration has been paid by an ineligible alien the presumption arises that the transfer was for the purpose of evading the statute. In *Oyama,* land was conveyed to an American citizen of Japanese ancestry with the consideration being paid by the Japanese father, an ineligible alien. California instituted escheat proceedings. This Court held the statute unconstitutional because it imposed an invidious discrimination between an American citizen of Japanese ancestry and an American citizen of non-Japanese ancestry—e.g., northern European extraction. The statute imposes upon the American citizen of Japanese extraction an onerous burden of proof to show that the payment by the father for the land conveyed to the citizen was not done with the purpose of evading the statute; failure to sustain the burden results in escheat. A similar conveyance to an American citizen of non-Japanese extraction would require no proof whatsoever and no risk of escheat.

There is just no similarity between *Oyama* and the instant case. The California alien land law does not deal with different types of activity. Instead it attaches vastly different consequences to the same act, based upon happenstance of racial origin of the actor. While differences in status may justify different consequences in appropriate cases—e.g., different maximum hours of work for women as against men—the state in *Oyama* seized upon a difference in the racial origin of its citizens to achieve a rank discrimination, and not any purpose within the competence of its police power. Act 201 does no such thing. It creates no invidious discrimination between classes of people performing the same activity. Act 201 applies to adults and minors, white and colored, citizen and non-citizen alike. The different consequences flow from different

activities and are reasonably related to objectives which the state has the constitutional authority to promote.

Morey v. *Doud,* 354 U.S. 457, 77 S. Ct. 1344, 1 L. ed. 2nd 1485 (1957), involved the validity of an Illinois statute which required firms selling or issuing money orders in the state to secure a license and to submit to state regulation. The statute, however, exempted the American Express Company from such requirements. This Court held that this statute created an invidious discrimination between the American Express Company and other companies with equal integrity and reputation. Again, the statute drew a distinction based upon status only to create discrimination and not to achieve any objective within the state's police power.

Petitioner seems to imply (Br. 18) that Act 201 is unconstitutional for the further reason that it is a drastic change from the common law, at least so far as minor children are concerned. Even assuming that Petitioner's premise is correct,[11] no constitutional infirmity attaches to Act 201. The state legislatures are not required to adhere to the common law nor are they precluded from reverting to the stringent requirements of the common law. This Court has had no difficulty in sustaining the validity of statutes abolishing causes of action for injuries occurring on the land of railroads unless negligence or wanton or wilful misconduct is shown. Such statutes have been upheld even as against minor children of the ages of five and seven, respectively. *Erie R. Co.* v. *Duplak,* 286 U.S.

[11] When Act 201 was enacted in 1953, the Michigan common law duty of a landlord to trespassers was the same for minors as for adults. In many types of cases, this meant that there was no duty of any kind owed. See *Lyshak* v. *City of Detroit, supra.*

440, 52 S. Ct. 610, 76 L. ed. 1214 (1932); *Erie R. Co.* v. *Hilt,* 247 U.S. 97, 38 S. Ct. 435, 62 L. ed. 1003 (1918). Similarly, automobile guests statutes have been sustained which preclude recovery by a non-paying guest in an automobile except upon a showing of recklessness. *Silver* v. *Silver, supra.*

Act 201 is a reasonable exercise of the state police power. It makes a reasonable distinction between different kinds of activities and attaches differing consequences to each. It involves no invidious discrimination. It is plainly constitutional.

B.

The Procedure Followed by the Michigan Supreme Court Was Consistent With Due Process of Law

Petitioner's principal argument (Br. 9-17) is that he was denied his day in court by being prevented from addressing himself to Act 201. He argues that this is a *Saunders* v. *Shaw* situation requiring a reversal of the Michigan Supreme Court judgment.

There is no basis in the record for Petitioner's contention. At the outset, it should be pointed out that Petitioner is somehow trying to create the impression that he was the victim of duplicitous conduct on the part of the Respondent as to which he was defenseless. He attempts to create the impression that Respondent had in its possession information that was available only to Respondent, and that Respondent intentionally or negligently failed to call this information to the attention of the trial court or of the Petitioner and waited to do so until the proceedings arrived in the Michigan Supreme Court. Nothing could be further from the truth. The Act contained provisions which were obviously beneficial to Respondent. No advantage

could possibly accrue to Respondent by concealing the statute if its counsel had been aware of its existence. Respondent's counsel knew that by raising the statute for the first time in the Michigan Supreme Court a very substantial risk would be involved that that Court might refuse to consider the Act. There was, therefore, no incentive for Respondent to withhold disclosure of Act 201 until the case came to the Michigan Supreme Court.

The fact is that at the time Petitioner filed his complaints in the Michigan Circuit Court, Act 201 was already on the books in Michigan. The statute was enacted in 1953 and should have been as well known to Petitioner as to Respondent. Nothing in Respondent's conduct in any way precluded Petitioner from knowing about the existence of the statute.

It was Petitioner's responsibility to plead and prove his case according to Michigan law.[12] Act 201 is an integral part of the Michigan law. Petitioner, in his complaints, specifically set forth that James and David Heider and their dog "set out muskrat trapping" (R. 4, 33); that the children were on Respondent's premises with its express or implied consent or they were licensees and invitees on the premises (*ibid.*); no allegation, however, was made in the complaint that any compensation had been paid to Respondent, or any

---

[12] It should be noted that Petitioner's substantive contentions before the state court were based entirely on state substantive law. Thus, this situation is unlike those where a claim is presented to a state court under federal law and the state court disposes of the claim on the basis of some state procedural ground. In such cases, the Supreme Court has exercised some supervisory responsibility in reviewing the state procedural ground since the procedural ground has obstructed the claim to the federal right. See Hill, "The Inadequate State Ground", 65 Colum. L. Rev. 943 (1965).

one else, for the Heider boys' activities on Respondent's land. The complaint further stated that Respondent knew that persons utilized its land for the purposes of hunting, fishing, trapping and other purposes, and that in the course of "ordinary care" it should have known that part of the pond area froze and part did not and that the chemical discharge into the pond gave the appearance of ice, so that people could walk on the pond thinking the entire pond was frozen and could drown (R. 2-3, 32-33).

At this stage of the proceeding, if Respondent had been aware of Act 201, it could have filed a motion to dismiss the complaint on the basis that the allegations in the complaint showed that the activities involved therein were covered by Act 201 and that plaintiff did not plead a cause of action because he failed to allege that compensation had been paid or that the deaths were the result of gross negligence or the wilful and wanton misconduct of Respondent. See *In re Del-Monte's Estate,* 340 Mich. 165, 65 N.W. 2d 309 (1954); *Michaelson* v. *Simula,* 264 Mich. 457, 250 N.W. 264 (1933); *Naudzius* v. *Lahr,* 253 Mich. 216, 234 N.W. 581 (1931). A reading of the opinions in the Michigan Supreme Court shows that under Michigan law, such a motion would have to be granted and the complaint ordered be dismissed. No constitutional question would have been involved under this set of circumstances, since it is a matter of state law and not federal law whether a complaint states a cause of action under state law.

Petitioner, however, seems to argue (Br. 11-12) that because the dismissal for failure to state a cause of action was by the State Supreme Court, he was deprived of a hearing on the factual question of whether

the boys were trapping within the meaning of the statute. The claim has no support in the record. The applicability of Act 201 was directly in issue before the Michigan Supreme Court. The Michigan Supreme Court could reasonably have anticipated that any available claim that the statute did not apply because of the facts would have been made then. But Petitioner made no such claim. He did not contend before the Michigan Supreme Court that the boys were not trapping or that compensation had been paid or that Respondent had been guilty of gross negligence or wilful and wanton misconduct. Nor did he indicate to the Michigan Supreme Court that he had any evidence different from that which he had offered during the trial. With no contention before it that other facts existed which would have a bearing on the subject matter, or that any new hearing would be useful, or even any motion for leave to amend the pleadings[13] we submit that the Michigan Supreme Court could reasonably rely on the pleadings[14] and on the record before it in determining whether the statute was to be applied.

The record was replete with references to the fact that the boys were trapping. Not only was this set out in the complaints, but throughout the pretrial proceedings and the trial similar statements were made. When the case was called for pretrial, the Court requested counsel for Petitioner to state what the case was about. Counsel responded (R. 13):

> "The two boys were brothers, James and David. On December 21, 1958 it was about 12 degrees

[13] Petitioner has never sought leave to amend his pleadings despite his claim (Br. 11) that somehow he has been deprived of that opportunity.

[14] *Cashaw* v. *Great Lakes Greyhound Lines, Inc.*, 331 Mich. 291, 49 N. W. 2d 183 (1951).

below zero *and they were muskrat hunting, they had some traps with them and they went onto some ponds that are maintained by the defendant.* The ponds are places where the defendant dumps its waste or by-products from potatoes, which has got some chemicals in it. The ponds were frozen except right in the area where the waste material comes into the pond". (Emphasis added)

Respondent did not put these words into Petitioner's mouth. They were the words of Petitioner's counsel. He was telling the Court the facts in the case as known to Petitioner and his counsel. The statement is clear and unequivocal—the boys were muskrat hunting, they had some traps with them, and they went onto the pond maintained by the Respondent.

When the case was called for trial, Petitioner made an opening statement to the jury as to what he expected to prove. He there said (R. 55-56):

"Now, what happened in this particular case is that David Heider was 8 years of age at this time, it was on December 21, 1958. He with his brother James, we call him Jimmy, he was 11 years old, they had been for quite a period of time setting traps out near Sebewaing in various parts of the community.

Now, on this particular day it was exceedingly cold, it was 12 degrees below zero or approximately thereabouts, and these two boys went out on a Sunday afternoon, about 3 o'clock to set their traps. They were hunting for, trapping for I believe it was the muskrat, something to sell, to make a little money.

* * * * * *

On this Sunday the 8 year old went over to the home of his brother, it is really I suppose his half

brother, he went over to his brother's house and they got some traps and they set out to trap. As I told you, they never came back at 5 o'clock".

At the trial itself, plaintiff called witnesses to prove the essential elements of his case. One of the first witnesses was the boys' grandfather, at whose home David Heider lived. The following questions and answers are from the direct examination of this witness by Petitioner's counsel (R. 64-65):

"Q. And tell us what happened the first part of the afternoon in relation to the boys going trapping?

A. Well, Jim and David, they left about 3:30 on the—

Q. Did, and from whose house did they leave?

A. They left from my place.

Q. From your place?

A. Yes.

Q. In other words, David came over to your house?

A. That's right.

Q. And Jim and David left together?

A. That's right.

Q. Now about what time did they leave your house?

A. About 3:30 in the afternoon.

Q. And what did they have with them, how were they dressed, describe it?

A. Well, they had on winter clothes and they had traps and a bicycle.

* * * * * *

Q. Did they leave your house together?

A. Yes.

Q. And when they left, they had what with them?

A. Their bicycle and traps."

Testimony was also adduced from James' mother (David's stepmother). On direct examination, she testified (R. 171-173) that she knew that James was trapping and that on December 21, 1958, when David came over to the house, he and James started out to trap. She game them permission provided they were back by 5 o'clock. When the boys did not show up, she went looking for them because she knew where they had placed their traps. She found one of the traps and actually found a muskrat in it. She put the muskrat in the car, and continued to look for the boys.

Petitioner called as a witness one of the persons who had helped recover the boys' bodies from the pond. This witness testified (R. 134) that when the bodies were found, three or four traps were also hooked out from the water where the bodies were.

No evidence was introduced that any compensation had been paid to Respondent in connection with the trapping activities of the Heider boys.

The trial judge, who acted as the trier of facts in the James Heider case, found (R. 19):

> "The facts in the two cases were comparatively clear and uncontroverted. On the afternoon of December 21, 1958, 12 year old James Heider and his 8 year old half brother, David Heider, received permission from their family to take their bicycle and their cocker spaniel to set out muskrat traps in the vicinity of their homes at Sebewaing, Michigan. When they did not return at the expected time, their grandparents went out to look for them but without success. Later a search party discovered the bodies of the boys and their dog at the bottom of a pond on defendant's premises. This pond was a considerable distance inside defendant's property and was used to store water

> from defendant's sugar manufacturing plant until some time in the spring when the State permitted it to be released into the Saginaw Bay. Although none of defendant's employees was shown to have specific knowledge that children trespassed upon defendant's premises to trap, they knew that trespassers came upon defendant's land during the hunting and trapping seasons and that traps were set at the ponds to catch muskrats which frequented them and actually did considerable damage to company property by digging holes in defendant's dikes. Defendant company put up 'no trespassing' signs at least twice a year but knew they did not remain in place and often were ignored."

Thus, from the point of view of the Michigan Supreme Court, the record before it, together with the statements of counsel in the briefs submitted to it,[15] gave no indication of any ambiguity or dispute as to the facts. Petitioner was on notice when he argued his case before the Michigan Supreme Court that the Court could take Act 201 into account and on the basis of that Act, could reverse the judgment either with or without a new trial. He argued that the Court should not consider Act 201, but he gave the Court no indication that the record was in any way deficient or that he could adduce additional evidence having a bearing on the issues in the case. The Michigan Supreme Court rendered its opinion only after Petitioner had been apprised of the issues and had been given a com-

---

[15] Petitioner in his Brief before the Michigan Supreme Court which was filed after Respondent in its Brief had urged that Court to consider Act 201 began his statement of the facts as follows (p. 1): "On December 21, 1958, James Heider, age 12, and David Heider, age 8½, and their cocker spaniel drowned while trapping for muskrats and minks on the defendant's property."

plete opportunity to present his views on the issues. Petitioner had his full day in Court.

Petitioner filed an Application for Rehearing in the Michigan Supreme Court. Here for the first time he attempted to assert federal constitutional rights. He also referred to the unfairness in not permitting him to amend his complaint—even though he has never requested permission to do so. The Michigan Supreme Court denied the Application without opinion. No constitutional issue is presented when the state court refuses a request to amend a complaint or when a party seeks a new remedy where by his own conduct he misconceived his appropriate remedy. See *Carr* v. *Nichols,* 157 U.S. 370, 15 S. Ct. 640, 39 L. ed. 736 (1895); *American Surety Co.* v. *Baldwin, supra.*

This is an entirely different situation from that which obtained in *Saunders* v. *Shaw, supra,* relied upon so heavily by Petitioner. That case involved a suit for injunction against the collection of a drainage tax. When the case was tried in the Louisiana trial court, plaintiff had offered evidence to show that the tax was improper since the land taxed was outside the levee system that the drainage commissioners were building and hence would receive no benefit. The defendant objected to the evidence as inadmissible under the pleadings and the objection was sustained. However, the evidence was spread upon the record in order to carry the case to the state Supreme Court. Judgment was for the defendant, and it was affirmed by the Louisiana Supreme Court. Upon Petition for Rehearing, however, the Louisiana Supreme Court held that under a decision of the United States Supreme Court decided after the original decision evidence of lack of benefit was relevant. The Louisiana Supreme

Court concluded from the evidence of lack of benefit which had been spread on the original record that judgment should be for the plaintiff. Defendant then petitioned the Louisiana Supreme Court for a second rehearing. The Louisiana Supreme Court denied the petition under its rule that only one rehearing should be granted in a case.

There are four basic differences between *Saunders* and the instant case. First, in *Saunders,* the state Supreme Court decided a controverted factual issue without permitting a hearing. Here, the Michigan Supreme Court decided that no cause of action had been stated, a question of law. No contested issue of fact was before the Michigan Supreme Court.

Second, in *Saunders,* the state court found benefit in the absence of any statement by the defendant supporting such a finding whereas, in the instant case the record abounds with allegations in the pleadings and statements by Petitioner's attorney and witnesses that the boys were on the land to trap without having paid compensation therefor and that Respondent was not guilty of gross negligence or wanton and wilful misconduct. Thus, in *Saunders,* a finding of fact was made by the Louisiana Supreme Court on an issue as to which the defendant had not been heard. In the instant case Petitioner himself had admitted or established all the relevent facts.

Third, in *Saunders,* the defendant had taken all necessary procedural steps in his behalf. He stated an adequate defense which was sustained by the trial court in accordance with the then prevailing law. In the instant case, Petitioner never set forth a cause of action; he failed to plead a case properly within the meaning of an applicable statute which he overlooked.

Whereas in *Saunders,* defendant could properly rely on the court sustaining his objection to evidence of benefit, here Petitioner can point to no act of the state courts or anyone else as the reason for his failure to note the statute or to plead a cause of action in accordance with that statute.

Finally, and most important, unlike *Saunders,* the change of decision by the Michigan Supreme Court is not based on a decision of the United States Supreme Court handed down after the trial and, in fact, after the State Supreme Court had originally spoken. It is based on a statute enacted long before the trial and on an interpretation of that statute which could have been foreseen by anyone familiar with the statute.

These distinctions between *Saunders* v. *Shaw* and the instant case are illustrated by the rationale of *Brinkerhoff-Farris Trust and Savings Co.* v. *Hill,* 281 U.S. 673, 50 S. Ct. 451, 74 L. ed. 1107 (1930),[16] a suit in a Missouri State Court to enjoin the collection of taxes. Plaintiff maintained that the tax was unconstitutional, a denial of equal protection of law because the assessor had intentionally and systematically discriminated against persons in Plaintiff's position by assessing its property at full value while intentionally and systematically assessing other property at only seventy-five percent of its value. Judgment was against the taxpayer. On appeal to the Missouri Supreme Court, the judgment was affirmed on the ground that Plaintiff had failed to exhaust its administrative remedies by seeking relief before the State Tax Commission. However, the law of Missouri, as enunciated by the Missouri Supreme Court prior to *Brinkerhoff,*

[16] See also, *Butler Bros.* v. *McColgan,* 315 U. S. 501, 509-510, 62 S. Ct. 701, 705, 86 L. ed. 991, 997 (1942).

was that the State Tax Commission had no jurisdiction to consider claims such as those advanced by Plaintiff. The earlier case was overruled by the Missouri Supreme Court in *Brinkerhoff*. Plaintiff's Petition for a Rehearing in the Missouri Supreme Court was denied.

This Court held that while the Missouri Supreme Court had the right to overrule its earlier decision, Plaintiff could not reasonably have anticipated that overruling and could not reasonably have been expected to seek relief from the State Tax Commission. This Court held that Plaintiff in attempting to vindicate its constitutional rights could not be denied an opportunity to a hearing by being told that it was required to resort to a forum which the Missouri Court had previously expressly held was not available to it. The opinion, however, was careful to point out that this result was reached because the Missouri Supreme Court had previously rendered a construction of its statute to the effect that persons in the position of Plaintiff could not resort to the State Tax Commission. The opinion then added (281 U.S. at 681, footnote 9, 50 S. Ct. at 455, 74 L. ed. at 1114).

> "Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate interpretation by the highest court might differ from its own."

The instant case falls squarely within the above quotation. Had Act 201 been enacted subsequent to the trial in this case, *Saunders* v. *Shaw* and *Brinkerhoff* would have required the Michigan Supreme Court to affirm the judgment if Act 201 were not retroactive or to remand for a new hearing if the Act were retro-

active. Or, if the Michigan Supreme Court had previously interpreted Act 201 and had held that no allegation of gross negligence and no allegation of compensation were required even where it was stated in the complaint that plaintiff had been trapping or hunting, *Saunders* and *Brinkerhoff* might have required a hearing. But neither is the case. Here, the statute had been enacted long before Petitioner's complaint was filed. And there was no Michigan authority on which plaintiff could rely for its failure to plead as the Michigan Supreme Court required. Consequently, Petitioner had full opportunity to be aware of Act 201 and had to assume the risk that the interpretation of the Michigan Supreme Court as to the requirements of pleading under the statute would differ from its own.

CONCLUSION

Respondent submits that the writ of certiorari should be dismissed or the judgment of the Michigan Supreme Court should be affirmed.

Respectfully submitted,

HARRY M. PLOTKIN
CARL H. SMITH
Counsel for Respondent

ARENT, FOX, KINTNER, PLOTKIN & KAHN
1815 H Street, N. W.
Washington, D. C. 20006

SMITH, BROOKER, HARVEY & COOK
212 Phoenix Building
Bay City, Michigan 48706

Of Counsel

November, 1966